

SUSAN HOUSE)
 Claimant)
 VS.)
 Respondent)
ALLIED STAFFING)
 Respondent)
 AND)
LUMBERMEN'S UNDERWRITING ALLIANCE)
 Insurance Carrier)

Docket No. 1,036,773

1. Did claimant suffer a series of accidental injuries which arose out of and in the course of her employment with respondent? Respondent argues that claimant did not work long enough to develop carpal tunnel syndrome and her problems are the result of several years working in hand-intensive jobs before coming to respondent. Claimant argues the opinion of P. Brent Koprivica, M.D., that claimant could develop carpal tunnel syndrome in the four weeks she worked

for respondent is the most persuasive, as her job was hand intensive and her hand and wrist symptoms began almost immediately.

2. Was claimant a full-time or part-time employee? Respondent argues that claimant never worked a full 40-hour week in the four weeks she worked for respondent. Claimant alleges that she was hired as a full-time, 40-hour-per-week employee and she did not work 40 hours in any one week due to holidays and off-work days.
3. What is the nature and extent of claimant's impairment? Respondent argues that claimant's employment with respondent only resulted in a temporary aggravation of her right wrist and hand symptoms. Claimant argues that the opinion of Dr. Koprivica that claimant did suffer permanent injuries over the four-week period of her employment with respondent is the most persuasive and the award of the ALJ in this regard should be affirmed.

FINDINGS OF FACT

Respondent, a temporary employment agency, placed claimant at Heritage Labs beginning on August 13, 2007. Claimant performed a job called "numbering", which caused her to handle hundreds of packages of paper per day¹ and to remove staples repetitively with a staple remover. This was a hand-intensive job. Claimant testified that her workweek was from 8:00 a.m. to 5:00 p.m., Monday through Friday, with the basic workweek being 40 hours. However, wage documentation² showed claimant's weekly work hours in the four weeks of employment at Heritage Labs to range from a high of 39.75 to a low of 22.72. At no time did claimant work a full 40-hour week.

Claimant was repetitively pinching and writing as she sorted papers. By the third day on the job, claimant's right hand and wrist started hurting. The pain was on both sides of her right wrist. By the third week on the job, the pain was worse and claimant began icing her hand and wrist. On September 11, 2007, claimant notified respondent about her hand and wrist problems and requested medical treatment. Claimant was told to leave Heritage Labs and the requested medical treatment was refused. The next day, claimant again called respondent and requested to see a doctor. Again, she was refused.

Claimant hired an attorney and an E-1, Application for Hearing, was filed with the Kansas State Workers Compensation Division (Division) on September 28, 2007, alleging

¹ R.H. Trans. at 12.

² R.H. Trans., Cl. Ex. 1.

a series of injuries from August 13, 2007, through September 11, 2007, with injuries to her right hand, wrist, arm, elbow and shoulder.

Claimant was then referred to board certified plastic surgeon and hand surgeon John B. Moore, M.D., for an examination on November 27, 2007. Claimant described wrist pain with numbness in the right ring and long fingers. A pronator teres compression test and a Phalen's test were both positive, but a nerve conduction test (NCT) was normal. Dr. Moore diagnosed symptoms of carpal tunnel syndrome (CTS) but opined that while a person may develop acute CTS in four weeks, a person cannot get CTS chronically, so that it stays permanent, in that amount of time. He stated it would take twelve weeks for the CTS to show up on an EMG or NCT. Dr. Moore testified that claimant, being a female and 44 years old, coupled with her earlier jobs in hand-intensive occupations, were more likely the causative factors in claimant's development of CTS, and not the work with respondent at the Heritage Labs.

Claimant was referred by her attorney to board certified emergency medicine and occupational medicine specialist P. Brent Koprivica, M.D., for an examination on March 4, 2008. Dr. Koprivica's history from claimant described the job with respondent and the preceding job history with hand-intensive labor working both phone customer service work and computer work. Claimant suffered no hand symptoms with those earlier jobs.

Claimant did attest to hand and wrist problems with the job with respondent. Claimant also told Dr. Koprivica of radiating pain into her hand and up her arm to her elbow and shoulder. However, when claimant testified at the regular hearing, her only complaints included the hand and wrist. There was no mention of elbow or shoulder problems associated with the job with respondent. During the examination by Dr. Koprivica, claimant exhibited limited grip strength on the right side. Claimant's range of motion was normal in both hands and wrists. A Tinel's examination was normal, but the Phalen's exhibited some parasthesias into her right little finger, and dorsal right hand pain as well. Claimant also displayed positive testing from radial tunnel syndrome on the right and positive Tinel's at the right elbow. Dr. Koprivica rated claimant at 10 percent for the CTS, 10 percent for the mild radial tunnel and 10 percent for mild cubital tunnel. He testified that, using the combined values chart of the fourth edition of the *AMA Guides*,³ the resulting combined impairment could be as high as 27 or 28 percent. But, he testified the actual impairment suffered by claimant was more in line with a 15 percent right upper extremity impairment at the elbow level. On cross-examination, Dr. Koprivica agreed that the overlying Tinel's test for CTS was normal as well as was the reverse Phalen's test. As noted above, when claimant testified at the regular hearing, her complaints were limited to her right hand and wrist. Claimant testified to no elbow or shoulder complaints.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁷

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁸

⁴ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2007 Supp. 44-501(a).

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁸ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

A claimant's testimony alone is sufficient evidence of his own physical condition.⁹

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.¹⁰

Claimant's testimony regarding the onset of symptoms in this matter is uncontradicted. While the testimony of Dr. Moore is contrary to a permanent injury, he does not dispute the possibility of claimant developing temporary symptoms in the time in question. The opinion of Dr. Koprivica, when coupled with the testimony of claimant, is persuasive that claimant did suffer a series of accidental injuries to her right upper extremity which arose out of and in the course of her employment with respondent while working the temporary job with Heritage Labs. The Board also finds that the 10 percent impairment at the level of the wrist for mild CTS, as found by the ALJ, is the most credible and should be affirmed.

K.S.A. 2007 Supp. 44-511(b)(4) states:

(b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:

...

(4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

¹⁰ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

K.S.A. 2007 Supp. 44-511(a)(5) states:

(a) As used in this section:

...

(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

Claimant testified that she was hired as a full-time employee, working or was expected to work from 8:00 a.m. to 5:00 p.m., Monday through Friday, for a 40-hour week. While claimant did not ever work 40 hours in any one week, it is the expectation which controls.

[T]he weekly rate is to be determined by multiplying the daily money rate by the "*number of days and half days that the employee usually and regularly worked, or was expected to work*".¹¹

Claimant's testimony that she was hired to work a full 40-hour week is uncontradicted in this record. The Award shall be modified to calculate claimant's average weekly wage at \$400.00 (40 hours times \$10.00 per hour).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to show an average weekly wage of \$400.00, but is affirmed in all other regards.

¹¹ *Id.* at 788.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Marcia L. Yates Roberts dated November 7, 2008, should be, and is hereby, modified to show an average weekly wage of \$400.00, but is affirmed in all other regards.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Susan House, and against the respondent, Allied Staffing, and its insurance carrier, Lumbermen's Underwriting Alliance, for an accidental injury which occurred as a series of injuries from August 13, 2007, through claimant's last day worked on September 11, 2007, and based upon an average weekly wage of \$400.00, for 20 weeks permanent partial disability compensation at the rate of \$266.68 per week totaling \$5,333.60 for a 10 percent permanent partial functional disability to the right upper extremity at the level of the wrist.

As of the date of this Award, the entire amount is due and payable and is ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of February, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Katie M. Black, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge